United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

186D

BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

18067

Criminal No. 895-62

676

Thomas W. Whalem,

Appellant

v.

United States of America,

Appellee

APPEAL FROM A JUDGMENT OF THE
UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

Robert N. Kharasch
1824 R Street, N. W.
Washington 9, D. C.

Attorney for Appellant
Appointed by this Court

February 14, 1964

QUESTIONS PRESENTED:

In a trial upon an indictment for rape and robbery:

1. Was there sufficient evidence of identification of defendant to support the verdict?

2. Should clothing removed from defendant's person have been admitted in evidence?

3. Did the trial judge err in his charge by failing to give proper emphasis to the evidence in defendant's favor?

INDEX

TABLE OF CASES

CONSTITUTION OF THE UNITED STATES

STATUTES

JURISDICTIONAL STATEMENT

This is an appeal in forma pauperis from convictions of robbery (22 D.C.C. 2901) and assault with intent to commit rape (22 D.C.C. 2801) by the United States District Court for the District of Columbia. This Court has jurisdiction under 28 U.S.C. §1291.

STATEMENT OF THE CASE

The complaining witness, Viola Morris, was a woman cab driver. She testified at the trial that about seven o'clock on the evening of September 28, 1962, she picked up: first, a family of four, and second, a single man (Tr. 3-5). After discharging the family, she testified, she drove the single man at his request to St. Elizabeth's hospital grounds (7-8). On arrival on the hospital grounds, Mrs. Morris testified that the male passenger robbed her of twelve dollars (Tr. 11), demanded that she go into a wooded place nearby, and there had sexual intercourse with her on the threat that if she refused, she would be killed (Tr. 12).

Some hours later, Mrs. Morris testified, she identified appellant in a line-up (Tr. 21-22) and she further identified him at the trial (22). Mrs. Morris also identified her clothing and her lipstick (24).

A witness Erickson testified that Mrs. Morris had come crying to him saying two men beat and robbed her (69).

A St. Elizabeth's guard lieutenant (Pruitt) testified that Mrs. Morris told him she had been attacked by a man with a goatee (80), and that at the line-up, only three men were presented to Mrs. Morris, of whom only appellant had a goatee (84). Lieutenant Pruitt also testified that Mrs. Morris had earlier identified appellant from photographs (89).

The father who had been one of the first group in Mrs. Morris' cab also identified appellant (103), but cross-examination revealed he had been drinking: "better than a half-pint" (107). His testimony as to where appellant sat in the cab (101) conflicted with Mrs. Morris' (5-6). His minor daughter's testimony also identified appellant.

Additional prosecution witnesses were:

Lottie Williams, identifying herself as appellant's good friend, who testified that appellant, in his sleep, on the evening of the alleged crime admitted robbing a woman (excluded) and that he had told her to say he was home all that night (127).

A police officer who testified to requiring appellant to remove his clothing (157), turning appellant's sweater

over to the FBI laboratory. Over objection (overruled) that the taking of the sweater was an illegal seizure (147-8), the sweater was received in evidence.

A doctor who testified to examining Mrs. Morris and taking a specimen of discharge from the womb (167), and finding intact sperm (178).

An FBI laboratory technician who purportedly identified a lipstick smear on appellant's sweater as the same type of lipstick which Mrs. Morris had identified (188).

Appellant testified that he was home all night on the day of the crime (2-17),* denied Lottie Williams testimony (2-40), stated that the lipstick on his sweater had come from another girl (2-49).

Appellant's mother testified that appellant was home on the evening of the crime (2-72-3). A roomer at the home testified that he drank with appellant from about 5:30 p.m. until nearly 7:00 p.m. (2-90-93).

Judge Holtzoff's charge to the jury (201-219) was objected to on the ground that it failed to mention evidence

---

* Pages identified "2- " are in the second volume of the transcript, which again begins at page 1.

brought out on cross-examination of Government witnesses (220-22).

The jury found appellant guilty of robbery and assault with attempt to commit rape, and he was sentenced (a) to from one to three years and (b) from five to fifteen years, the sentences to run consecutively.

CONSTITUTIONAL PROVISION INVOLVED

Constitution of the United States, Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF POINTS

1. There was insufficient identification of defendant to warrant submission of the case to the jury.
2. The admission in evidence of a sweater removed from defendant's person violated his Fourth Amendment rights.
3. The trial judge's summary of the evidence failed to recite evidence in defendant's favor.

SUMMARY OF ARGUMENT

I. INSUFFICIENT IDENTIFICATION

Appellant was convicted upon identifications by the complaining witness, a male passenger in the taxicab, and a minor child. The complaining witness' original identification was from a picture of defendant at the age of 13. In a subsequent three-man line-up, appellant was the only one of the three men presented wearing a goatee. The male passenger admitted to drinking fairly heavily. Under these circumstances, appellant claims the identification was insufficient to connect him with the alleged crime: Cooper v. United States, 218 F. 2d 39 (C.A.D.C., 1954).

II. ADMISSION OF CLOTHING TAKEN FROM APPELLANT'S PERSON

Government presented testimony that a lipstick stain on appellant's sweater matched the complaining witness' lipstick. After arrest, appellant was forced to remove the sweater (and other clothing) and give it to the police, a procedure which appellant claims violated his Constitutional rights: United States Constitution, Amendment IV.

III. FAILURE OF THE JUDGE'S CHARGE TO DISCUSS EVIDENCE FAVORABLE TO APPELLANT

The trial judge discussed the evidence in his charge to the jury. Objection was made to failure to include evidence brought out on cross-examination, and the objection was denied. Appellant claims that the failure to give fair emphasis exceeded the limits of discretion: Boatright v. United States, 105 F. 2d 737 (CCA 8th, 1939).

ARGUMENT

I. INSUFFICIENT IDENTIFICATION.

(The Court's attention is called to the following pages of the transcript: 21-22, 80-84, 89, 103, 106-107, 109, 112)

The complaining witness first identified appellant from a picture taken in 1956 when appellant was 13 years old (89). Her identification was apparently somewhat tentative, and she is quoted as saying "this looks like the man, I believe he is" or "she thought this would possibly be the man" (89).

The complaining witness had told the police she was attacked by a man with a goatee (80). She was then presented with a three-man line-up, including appellant,

in which appellant was the only one of the three wearing a goatee (84). At the trial, of course, she again identified appellant (22).

Another passenger in the cab identified appellant as riding with the complaining witness (103). Cross - examination revealed -- with some difficulty -- that the witness had been drinking substantial amounts at the time: "better than a half-pint" (107).

The minor child of this witness, also a passenger in the cab, also identified appellant (112). The only other evidence connecting appellant with the alleged crime was the lipstick-on-sweater testimony discussed below.

Appellant claims that this combination of (a) the complaining witness' identification after a stacked line-up in which only appellant had the identifying feature of the assailant (a goatee), (b) identification by a man heavily drinking, and (c) identification by a minor was insufficient to justify submission of the case to the jury: Cooper v. United States, 218 F. 2d 39, 94 U.S. App. D.C. 343 (1954); see Curley v. United States, 160 F. 2d 229, 81 U.S. App. D.C. 389 (1947).

II. ADMISSION OF CLOTHING TAKEN FROM APPELLANT'S PERSON

(The Court's attention is called to the following pages of the transcript: 147-8, 157, 188)

The Government was at pains to obtain expert testimony that a lipstick stain on appellant's sweater matched the complaining witness' lipstick (188).

The sweater had been obtained by the police after appellant's arrest, in a cellblock, when he was told to remove all his clothing and put on other clothes. At the trial, defense counsel objected to admission of the sweater, but the objection was overruled (147-8). Appellant renews his claim that the taking of the sweater was illegal: United States Constitution, Fourth Amendment; but see Breithaupt v. Abram, 352 U.S. 432 (1957).

III. FAILURE OF THE JUDGE'S CHARGE TO DISCUSS EVIDENCE FAVORABLE TO APPELLANT

(The Court's attention is called to pages 201-222 of the transcript)

Judge Holtzoff's charge to the jury appears at pages 201-219 of the transcript. The trial judge discussed the evidence at some length (209-217). At the conclusion of the charge, defense counsel objected that in no instance had any evidence been mentioned that appeared on cross-examination of

Government witnesses (220). In particular objection was made to failure to note that the doctor examining the complaining witness found blood pressure and pulse within normal limits (221) and to "the witnesses in the cab." This last objection refers to the fact that the complaining witness had testified appellant sat in front (5), while the other adult passenger had said appellant sat in back (101).

The court's charge also failed to advert to the evidence that the complaining witness immediately after the incident had said she was attacked by <u>two</u> men (69).

The rule is clear that:

> "The trial judge should state the facts not only with accuracy but with fairness, referring both to that which is favorable to the defendant and that which is unfavorable to him."

<u>Boatright</u> v. <u>United States</u>, 105 F. 2d 737, 740 (CAA 8th, 1939). Accord: <u>Billeci</u> v. <u>United States</u>, 184 F. 2d 394, 87 U.S. App. D.C. 402 (1950); <u>Buchanan</u> v. <u>United States</u>, 244 F. 2d 916 (C.A. 6, 1957).

Appellant claims that the trial judge's charge failed to give a balanced picture of the evidence, thus

violating the standards requiring fair and impartial discussions of the evidence.

Respectfully submitted,

Robert N. Kharasch
1824 R Street, N. W.
Washington 9, D. C.

Attorney for Appellant
(Appointed by this Court)

February 14, 1964

CERTIFICATE OF SERVICE

A copy of the foregoing brief was this day delivered to the office of the United States Attorney.

February 14, 1964

Robert N. Kharasch

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,067

THOMAS W. WHALEM, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

SUPPLEMENTAL MEMORANDUM

The attached supplemental memorandum was filed in Charles D. Pouncey v. United States, No. 18,565, and is filed herein pursuant to leave granted by the Court during oral argument of this case on December 7, 1964.

/s/ DAVID C. ACHESON
DAVID C. ACHESON
United States Attorney

/s/ FRANK Q. NEBEKER
FRANK Q. NEBEKER
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the attached Supplemental Memorandum in the case of Charles D. Pouncey v. United States, No. 18,565, was mailed to counsel for appellant on December 4, 1964, and a copy of this page was mailed to counsel for appellant, Robert N. Kharasch, Esq., 1824 R Street, N.W. Washington, D. C., 20009, this 8th day of December, 1964.

/s/ FRANK Q. NEBEKER
FRANK Q. NEBEKER
Assistant United States Attorney

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,565

CHARLES D. POUNCEY, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

SUPPLEMENTAL MEMORANDUM

At oral argument before a panel of this Court on November 17, 1964, the Court requested counsel to file memoranda stating their views on the significance of the District Court's failure to make an express finding that appellant was competent to stand trial. This memorandum is submitted by appellee in compliance with that request.

On November 17, 1963, appellant, through his court-appointed attorney, moved the District Court for a mental examination. This motion was granted and appellant was committed to Saint Elizabeths Hospital for ninety days for the examination. On January 17, 1964, the Superintendent of Saint Elizabeths Hospital, by letter filed in the District Court on January 23, 1964, and contained in the record on appeal, reported that appellant was competent to stand trial and had not been suffering from a mental disease or defect on the date of the alleged offense. Appellant's trial commenced on February 17, 1964. Nowhere in the record on appeal or in the record of this case

remaining in the District Court does it appear that any judge of the District Court ever expressly found that appellant was competent to stand trial. Neither does it appear that appellant, either pro se or through counsel, objected to the contents of the Superintendent's letter or requested a hearing and determination of his competency to stand trial. Appellee's view of the significance of these facts is set forth below in four numbere points.

I. Section 301 of Title 24, D. C. Code, does not require the District Court to make a formal finding that the accused is competent to stand trial where the examining hospital reports that the accused is competent and neither the accused nor the Government objects.

Proceedings to determine the competency of criminal defendants in the District of Columbia are governed by section 301 of title 24, D. C. Code, and, to the extent not "inconsistent" with section 301, by 18 U.S.C. § 4244, see D. C. Code § 301(h). On the subject of hearings and judicial findings of competency, section 301 quite clearly was intended to supplant the procedures laid down in 18 U.S.C. § 4244. See H. Rep. No. 892, S. Rep. No. 1170, 84th Cong., 1st Sess. (1955); 101 Cong. Rec. 9258 (Cong. McMillan, floor manager), 9259 (Cong. Davis sponsor), 12228 (Sen. Morse, floor manager).

A hearing to determine the defendant's competency is expressly required by section 301 only where the Government or the accused "objects" to a psychiatric report of incompetency

or to a psychiatric report of restored competency after a prior commitment for incompetency. Neither section 301 nor this Court's decisions prior to the amendment of section 301 in 1955, ch. 673, 69 Stat. 609, requires a hearing where the initial psychiatric report is that the accused is competent and where neither party requests a hearing. Gunther v. United States, 94 U.S. App. D.C. 243, 246 n.9, 215 F.2d 493, 496 (1955) ("Such a hearing is required by the statute [§ 4244] only where there has been a psychiatric finding of present incompetency"). Although section 301 does not in terms forbid such hearings, it would be anomolous to require them in every case in which a mental examination has been conducted and the hospital has reported that the defendant is competent to stand trial. The two situations expressly covered by the statute -- a report of present incompetency and a report of restored competency -- much more critically affect the defendant's substantial interests than does an initial report of competency. Delay of trial by commitment of an accused to a mental hospital or subjection to trial of an accused who has once been committed as incompetent[1/] more appropriately calls for a conscious and informed judicial choice than does subjection to trial of an accused who has never been found to be incompetent and

---

1/ "An adjudication of incompetency gives rise to a presumption of continued incompetency." Gunther v. United States, supra at 246 n.12, 215 F.2d at 496.

whom psychiatrists find to be presently competent. To require a hearing in every case of the latter type, notwithstanding that an invariable requirement of a hearing in every case of the former types has been forbidden, would subvert Congress' expressed intention to expedite uncontested competency proceedings. See legislative materials cited supra.

Apart from the requirement of a hearing, the only requirment of a formal finding of fact, entered on the record, concerning the defendant's competency is in section 301(b) which states that when a person confined to a hospital as incompetent "is restored to mental competency . . . the superintendent shall certify such fact to the clerk of the court . . . and such certification shall be sufficient to authorize the court to enter an order thereon adjudicating him to be competent to stand trial, unless the accused or the Government objects . . . ." A formal adjudication at this juncture is appropriate in view of the presumption of incompetency which arises from the original commitment. See note 1, supra.

Not even in the case of an initial report of incompetency does section 301(a) require a formal entry of record adjudicating the accused to be incompetent. It provides that if the hospital reports that the accused is mentally incompetent to stand trial, "such report" -- not a finding or adjudication based on the report -- "shall be sufficient to authorize the court to commit the accused by order to a hospital for the mentally ill . . . ."

Although the case of an initial report of competency is not expressly covered by the statute, appellee would respond to a proposal that a formal finding should be obligatory with the same doubts as it expressed concerning the requirement of a hearing in such a case: why should more be commanded when less is needed?

It is questionable what useful purpose a mandatory formal finding of competency would serve when the accused has been reported as competent and neither the accused nor the Government doubts the accuracy of the report enough to challenge it. Such a finding would neither aid appellate review nor foreclose collateral attack, since it would be based on no more than the hospital certification, which itself becomes part of the record in the case. If the psychiatric report of competency is ill-founded, it is doubtful that the entry of a finding based solely on that report would insulate a subsequent conviction and preclude the defendant from later asserting successfully his incompetency. Cf. Sanders v. United States, 373 U.S. 1 (1963); Bishop v. United States, 350 U.S. 961 (1956), vacating 96 U.S. App. D.C. 117, 223 F.2d 582 (1955).

Even under 18 U.S.C. § 4244, which might be open to a different interpretation from that suggested for section 301, all of the Circuits known by appellee to have considered the question

have held that no hearing or formal finding of competency is required when the examining psychiatrist reports that the accused is competent and no request for a hearing is made. See Amador Beltran v. United States, 302 F.2d 48 (1st Cir. 1962) (by implication); Coffman v. United States, 290 F.2d 212 (10th Cir. 1961); Hereden v. United States, 286 F.2d 526 (10th Cir. 1961); Formhals v. United States, 278 F.2d 43 (9th Cir. 1960); Krupnick v. United States, 264 F.2d 213 (8th Cir. 1959). This Court's admonition in Watson v. United States, 98 U.S. App. D.C. 221, 223, 234 F.2d 42, 44 (1956), must be read in the light of the apparent inadequacy of the record in that case (footnote 2 suggests that not even a report of the mental examination granted on defendant's motion appeared in the record) and the fact that a new trial, required by the reversal of the conviction on other grounds, would commence at least three years after the most recent mental examination of the defendant.

II. (Pretermitting Point I.) The District Court implicitly determined that appellant was competent to stand trial.

The trial court knew that appellant had been examined at Saint Elizabeths Hospital and that the hospital staff had found him to be competent (Tr. 4). In the absence of a request for a competency hearing, the court proceeded to trial. Its action implies that it endorsed the hospital's finding. In a

similar case, Judge Wright, concurring, noted the absence of an explicit finding of competency, but expressed the view that the court's "ruling to this effect is clear from its actions." Cooper v. United States, No. 17,669, D. C. Cir., April 9, 1964, slip op., p. 4; accord, Coffman v. United States, supra; cf. Ashton v. United States, 116 U.S. App. D.C. 367, 324 F.2d 399 (1963). Any doubt about the trial court's ruling in the present case is dispelled by the court's sustaining of an objection to a question phrased in terms of "compentency" (Tr. 30-31). The issue simply was not in the case at that point. Appellant's counsel acquiesced.

III. (Pretermitting Points I and II.) The failure of the District Court to determine that appellant was competent to stand trial was harmless error.

Even if the District Court should have determined appellant's competency to stand trial but did not, the District Court's error in this respect was harmless.[2/] See Ashton v. United States, supra; Krupnick v. United States, supra. The comprehensive information about appellant's mental condition contained in the record indicates, without significant exception, that appellant was unquestionably competent.

The staff of Saint Elizabeths Hospital found that appellant was competent, as indicated by the Superintendent's letter contained in the record on appeal. Dr. Owens of that hospital testified at length and opined that appellant was without mental disease or defect (Tr. 134-154).

Whatever emotional or mental abnormality appellant possibly possesses, it may fairly be characterized as a personality disorder. The theme of Dr. Perl and Mr. Silberman's testimony is that appellant is a hostile and aggressive person whose behavioral controls are inadequate (Tr. 88-132). Nowhere in the record do any of the experts observe distortions of perception, inability to communicate, or defect of intelligence.

2/ "(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded." Fed. R. Crim. P. 52.

Competency is a legal rather than a medical concept. It denotes the intellectual and emotional capacity of the accused to perform the functions which are essential to the fairness and accuracy of a criminal proceeding. American Bar Foundation, The Mentally Disabled and the Law 357-358 (Lindman & McIntyre, eds., 1961). Medical evidence on the capacity of the accused to perform those functions may be helpful in determining his competency. But the medical concept of mental health does not correspond to the legal concept of competency. A person may be mentally ill, requiring hospitalization, and also competent to stand trial. Lyles v. United States, 103 U.S. App. D.C. 22, 26-27, 254 F.2d 725, 729-730 (1957), cert. denied, 356 U.S. 961 (1958); Durham v. United States, 99 U.S. App. D.C. 132, 134, 237 F.2d 760, 762. The question in any case is whether mental illness has disabled the specific functions of personality which sound policy in the administration of criminal justice require before the accused may be subjected to adversary proceedings on the charge against him.

In federal courts, competency is defined as the capacity of the accused "to understand the proceedings against him [and] . . . properly to assist in his own defense." 18 U.S.C. § 4244 (1958); D.C. Code § 24-301 (1961). The pertinent inquiry is "whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and whether he has a rational as well as a factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1962).

This test might be particularized to include whether the accused is able: to understand and respond appropriately to the facts that he has been charged with a specific criminal offense and that the ultimate purpose of the proceedings against him is to ascertain his guilt of that offense and impose formal punitive sanctions if guilt is found; to perceive, remember, and describe intelligibly the events out of which the criminal charge has arisen; to inform counsel of the identity of persons who might know about those events; to comprehend the testimony of witnesses and be able to compare that testimony with his own memory and communicate the comparison to counsel.

Competency does not imply the greatest possible degree of efficiency in performing these functions, but only such efficiency as will reasonably insure the fairness of the proceedings and the accuracy of the outcome. For the requirement of competency derogates from the legitimate interest of both society and the accused in a speedy disposition of criminal charges.

It is evident from the transcript that appellant was able to perform all of the essential functions of competency without significant impairment. He testified lucidly. Indeed, it is remarkable to note that in twenty-three transcribed pages of testimony, only rarely did appellant misinterpret or respond inappropriately to a question asked of him on the witness stand (Tr. 65-88). This shows an unusual degree of understanding and verbal facility, judging by the testimony of most witnesses. His testimony was a clear and vivid account of his version of what had happened and reflects a rational understanding of the crime

with which he was charged and of the nature of the proceedings against him.

Appellant himself did not believe that he was mentally ill; all he needed was some "guidance" for his behavioral problem (Tr. 71-72).

The record reflects several times when appellant conferred with his lawyer during the course of the trial (Tr. 128, 155-56, 157, 166), and one occasion when he assumed the examinatio of a witness. His question was relevant and right to the point of the rebuttal testimony which he later sought to procure (Tr. 148-150).

Not even appellant's expressed hostility toward his tria counsel visibly hampered the defense of the case: that very hostility was introduced by the defense as evidence for acquittal by reason of insanity (Tr. 129-131).

Appellant's oral "statement" after his testimony had flown in the face of testimony by three government witnesses and his insanity defense had turned out to be puny, requesting his attorney to "plead me guilty" (Tr. 133), reflects not upon his competency to stand trial but upon his lawyer's ability to maintai control of the case. It should be noted that appellant's trial counsel asked special permission to re-open the defense case and put appellant on the stand to make the "statement". Counsel's request may have been ill-advised, but appellant's request for and use of the opportunity to make the "statement" reflects his exasperation with the weakness of his defense, not incompetency to

stand trial. Surely ability to cooperate with a lawyer in one's own defense does not connote persistent determination to plead not guilty and undergo the ordeal of a trial, especially when the evidence of guilt is clear and the defense is weak. If the contrary were true, a plea of guilty would be conclusive evidence of incompetency and every criminal defendant would have to be subjected to trial. In this case, appellant's trial counsel may have compromised his control of the case by permitting appellant to make his "statement". But he did not surrender control altogether, for he ignored appellant's request and allowed the case to go to the jury, as well he might when the defendant has made up his mind to plead guilty only at the eleventh hour or trial: no favor is to be gained by entering a plea at that point, and there is always the chance of an acquittal at the hands of a capricious jury.

The failure of the trial court to take any action in response to appellant's "statement" is insignificant. No plea was formally offered, for counsel ignored his client's request. Anyway, the court was not obliged to accept the plea, Fed. R. Crim. P. 11, and would have been rash to do so at that point in the trial. Finally, the trial court was in no position to declare a mistrial unless requested by the defense, lest jeopardy preclude a retrial.

IV. (Pretermitting Points I, II, and III.) If the District Court erred in failing to determine that appellant was competent to stand trial, its error can be corrected most effectively by remanding the case for a nunc pro tunc determination of appellant's competency to stand trial on February 17-19, 1964.

This is not a case in which the error suggested is the trial court's failure to submit the defendant to mental examinatic at all. In such a case, contemporaneous expert testimony may be lost forever, and a new trial preceded by the requested examinatic and determination may be necessary to insure accuracy. E.g., Holloway v. United States, No. 18,017, D.C. Cir., November 5, 1964 In the present case, appellant's competency at the trial which has already occured could more accurately be determined than his present competency to stand trial. The trial court would have the advantage not only of the original contemporaneous psychiatric examination, but of Dr. Perl's extensive testing, which is becoming more and more obsolete as time passes, and of his own observations of appellant's behavior in the concrete trial situation. Moreover, if this Court remands immediately, no more than ten months need have passed since the trial. A new mental examinatio and determination of appellant's present competency, followed by a new trial, would provide no more comprehensive information about appellant's present competency than already exists and can be developed concerning appellant's competency at the former trial. Accordingly, the authorities supporting a nunc pro tunc determination in such a case are in point. See Hunter v. United

States, 116 U.S. App. D.C. 323, 323 F.2d 625 (1963); Krupnick v. United States, supra; Wells v. United States, 99 U.S. App. D.C. 310, 239 F.2d 931 (1956) (en banc); Gunther v. United States, supra.

Respectfully submitted,

/s/ DAVID C. ACHESON
DAVID C. ACHESON
United States Attorney

/s/ FRANK Q. NEBEKER
FRANK Q. NEBEKER
Assistant United States Attorney

/s/ DAVID W. MILLER
DAVID W. MILLER
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplement Memorandum has been mailed to attorney for appellant, Dickson R. Loos, Esq., Brawner Building, 888 17th Street, N.W., Washington, D. C. 20006, this 4th day of December, 1964.

/s/ DAVID W. MILLER
DAVID W. MILLER
Assistant United States Attorney

BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,067

THOMAS W. WHALEM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
MAX FRESCOLN,
Assistant United States Attorneys.

QUESTIONS PRESENTED

(1) In a rape and robbery case where the complainant, a woman taxi driver, positively identified appellant as her assailant, and two witnesses identified appellant as the man who had been the complainant's passenger shortly before the rape, and where the sweater appellant was wearing when he was arrested had lipstick stains which significantly matched the lipstick the complainant was wearing when she was attacked, was there not sufficient evidence for the jury to conclude it was appellant who committed the crimes?

(2) When appellant was validly under arrest and in custody, was not it a proper procedure for the police officers to require appellant to render his sweater for the purpose of submitting it to laboratory analysis?

(3) Was not the court's summary of the evidence in the jury charge fair?

INDEX

TABLE OF CASES

* Cases or authorities chiefly relied upon are marked by asterisks.

Cases—Continued

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,067

THOMAS W. WHALEM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court for the District of Columbia

---

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

An indictment filed October 22, 1962, charged appellant with robbery (22 D.C.C. 2901) and rape (22 D.C.C. 2801). A jury convicted appellant of robbery and assault with intent to commit rape. By Judgment and Commitment filed July 1, 1963, appellant received consecutive sentences of imprisonment of one to three years for the robbery, and five to fifteen years for the assault with intent to commit rape. This appeal followed.

Mrs. Viola Morris testified that on September 28, 1962, appellant raped and robbed her on the grounds of Saint

Elizabeths Hospital. (Tr. 11, 12, 19, 22.) Mrs. Morris was then a cab driver (Tr. 11). On the evening of September 28, 1962, when appellant hailed her cab on Monroe Street near Thirteenth Street, she already had passengers, a man and three children (Tr. 3, 5). Mrs. Morris told appellant she had to deliver her fares to their nearby destination before she could take him where he wanted to go (Tr. 5). Appellant got into the cab with Mrs. Morris and her other passengers (Tr. 5-6). After the man and three children got out of Mrs. Morris' cab at their destination, Mrs. Morris drove appellant to Saint Elizabeths Hospital (Tr. 6-7). Appellant told Mrs. Morris that he was late for his work, and that his supervisor had told him he would be fired if he was not there by 8:00 p.m. (Tr. 8). They arrived at the hospital at approximately 7:30 or 7:40 p.m. (Tr. 8). Appellant directed Mrs. Morris to the "sex and prisoner building", which Mrs. Morris did not know the location of (Tr. 9). He directed her down the road in a wooded area (Tr. 9). After they had gone a short distance, appellant told her to stop; and he switched off the ignition, and threw the "gear shift up" (Tr. 10). Mrs. Morris started to jump out of the car (Tr. 10). Appellant told her not to run or holler, or he would kill her (Tr. 10). Appellant took her money consisting of two five-dollar bills, a one-dollar bill, and some change (Tr. 11, 12). Appellant told Mrs. Morris that if she did not have sexual intercourse with him he would kill her (Tr. 12). He began choking her (Tr. 12). He continued to threaten her. Mrs. Morris was frightened and feared for her life. (Tr. 12, 28.) Appellant then had intercourse with her against her will (Tr. 13, 19). Mrs. Morris blacked out (Tr. 19). When she came to, appellant was not there (Tr. 19). She was in a daze (Tr. 19). Mrs. Morris got up and went in the direction of a nearby house (Tr. 20).

John Erickson, a visitor at Saint Elizabeths Hospital that evening, testified that at approximately 8:00 p.m. Mrs. Morris stumbled out of the brush. She came stumbling across the lawn crying, and panting. She fell about

10 or 15 feet from where he was, and told him she had been beaten and robbed. Mr. Erickson testified that she said two men beat and robbed her. Mr. Erickson had his wife call the gate guards who came and got Mrs. Morris. (Tr. 68-70.)

Lieutenant Allan Pruit of the guard force, Saint Elizabeths Hospital, testified that he responded to a call from a gate guard, and went to the place where Mrs. Morris was lying on the ground in a state of shock (Tr. 73). She said she had been raped and robbed, and complained of pain to her back (Tr. 73). She was taken to Minor Surgery in the Medical and Surgical Building there at Saint Elizabeths Hospital, where she was given first aid (Tr. 73, 77). She described her bearded assailant and the circumstances of her having picked him up as a passenger and eventually having been robbed and raped by him (Tr. 73, 74, 76).

Doctor Edward Diggs, a physician on the staff of Saint Elizabeths Hospital, examined Mrs. Morris at approximately 8:40 p.m., and found her to be suffering from a state of physchogenic shock (Tr. 97). The doctor recommended she be transferred from Minor Surgery to D.C. General Hospital for a more complete examination (Tr. 98). She was transferred to D.C. General (Tr. 76). Doctor Hester Lewis, an intern on the staff of D. C. General Hospital, examined Mrs. Morris and found a laceration of the right upper lip, and tenderness at Mrs. Morris' throat (Tr. 162, 166). She had a scratch on her left thigh (Tr. 166). She had some sero-mucous discharge at the cervical opening, which Doctor Lewis examined under a miscroscope, and determined contained intact sperm (Tr. 167, 178-179).

The Identication of Appellant

At trial Mrs. Morris positively identified appellant as the man who had robbed and raped her (Tr. 22). She had also positively identified him on the night in question (Tr. 22, 78, 83-84, 140). James Jackson and his thirteen-year-old daughter, Luvenia E. Jackson, testified they were

passengers in Mrs. Morris' cab on the evening of September 8, 1962, when a man hailed the cab and got into it with them (Tr. 99, 100, 103, 109, 111, 112, 113). Mr. Jackson testified the man wanted to go to some hospital (Tr. 101). Miss Jackson testified "he said he wanted to go to D. C. General Hospital for work and he was late." (Tr. 111.) They positively identified appellant as the man (Tr. 103, 112-113).

George Wolfgang of the Sex Squad of the Metropolitan Police Department testified he arrested appellant at his home (Tr. 128). Sergeant John Kline of the Sex Squad testified that he searched appellant and found two five-dollar bills in his wallet along with another ten dollars, and some silver (Tr. 140-141). Later at the cellblock, Sergeant Kline had appellant take off his sweater which had red greasy stains on the right sleeve and left shoulder (Tr. 146, 157). The sweater was submitted to the FBI laboratory, where a chemist compared red greasy stains in the sweater with the lipstick Mrs. Morris testified she had worn that evening (Tr. 24-25, 147, 187-188). The expert testified that the lipstick had two dyes which were the same two dyes as found in the red greasy material on the sweater (Tr. 187-188). He testified that the same combination of dyes would possibly occur in two or three manufacturers' lipsticks, but not many (Tr. 191). The two dyes in combination are found only in lipsticks and sometimes in food coloring and Easter egg dyes (Tr. 191).

Lottie Williams testified she spent part of the evening with appellant in his room. She first saw him between 9:00 and 9:30 p.m. on September 28, 1962 (Tr. 116). When the police officers came to arrest appellant in the early morning of September 29, 1962, appellant said to Mrs. Williams "Don't forget, I was home all night." (Tr. 126-127.)

Appellant testified he was home between 7:00 p.m. and 9:00 p.m. on September 28, 1962 (Tr.(2) 4-5).[1] He de-

[1] Volume 2 of the transcript is referred to as "Tr. (2)" throughout appellee's brief.

nied robbing or raping Mrs. Morris (Tr.(2) 6). On cross-examination appellant testified that the 1300 block of Monroe Street, which was where Mrs. Morris testified she picked up her assailant, was on about the next corner from his home (Tr.(2) 27). At first he denied, but then later admitted being familiar with the grounds of Saint Elizabeths Hospital (Tr.(2) 28, 35). He said he had a goatee on September 28, 1962 (Tr.(2) 38). Appellant denied telling Lottie Williams to remember he had been home all evening (Tr.(2) 46). He said the lipstick got on his sweater while having intercourse with a girl he had picked up at a movie on September 27, 1962 (Tr.(2) 49-50, 63). He said Lottie Williams saw the lipstick stains and reproached him for taking up with some other woman (Tr.(2) 50-51). Appellant's mother, Mary Lane, testified she did not see her son that evening but heard him call from upstairs in her house about 7:45 p.m. (Tr.(2) 73, 75). Lottie Williams testified on re-direct examination that she had not observed lipstick on appellant's sweater, and had not quarrelled with appellant about it (Tr.(2) 97).

STATUTES INVOLVED

Title 22, District of Columbia Code, Section 2801, provides in pertinent part:

> Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not more than thirty years. * * *

Title 22, District of Columbia Code, Section 2901, provides:

> Whoever by force or violence, whether against resistence or by sudden or stealthy seizure or snatching, or by putting in fear, shall take from the person or immediate actual possession of another anything of value, is guilty of robbery, and any person convicted thereof shall suffer imprisonment for not less than six months nor more than fifteen years.

Title 22, District of Columbia Code, Section 501, provides in pertinent part:

> Every person convicted of any assault with intent to kill or to commit rape * * * shall be sentenced to imprisonment for not more than fifteen years.

SUMMARY OF ARGUMENT

The record shows that there was a sufficient identification of appellant for the jury to conclude that he was guilty of robbery and assault with intent to commit rape. The victim of the crimes, a woman taxi driver, positively identified appellant as her attacker. The identification was corroborated by two witnesses who positively identified appellant as the man with whom they had briefly shared the complainant's cab shortly before the crimes. There was further corroboration by lipstick stains in the sweater appellant wore when arrested on the night of the crimes which significantly matched the lipstick the complainant wore when she was attacked. It was a proper procedure for the police to take appellant's sweater from him and submit it to the FBI laboratory for analysis when appellant was validly under arrest. The court's instructions to the jury did not invade their function as the triers of fact. Read as a whole and compared to the trial testimony, it is clear that the court's summary of the evidence was fair, that the jury was clearly instructed that their judgment controlled as to the facts, and that the matters appellant claims should have been mentioned in the summary were of little significance in the trial.

ARGUMENT

I. The victim's positive identification of appellant, corroborated by other testimony, provided the jury ample evidence from which it could conclude that it was appellant who committed the crimes.

(See Tr. 3-23, 99-103, 109-113.)

The complainant, Mrs. Morris, positively identified appellant as the man she picked up as a passenger in her

taxicab and who subsequently robbed and raped her. Two other witnesses positively identified appellant as the man she had picked up as a passenger a short time prior to the crimes. Further corroboration of the identification was provided by the physical evidence that appellant's sweater had lipstick stains which significantly matched the lipstick Mrs. Morris wore the night of the offenses. The evidence was more than sufficient for a jury to conclude that it was appellant who committed the crimes.[2] See *Walker* v. *United States*, 96 U.S. App. D.C. 148, 223 F.2d 613 (1955); *Roberts* v. *United States*, 109 U.S. App. D.C. 75, 284 F.2d 209 (1960); *Ewing* v. *United States*, 77 U.S. App. D.C. 14, 135 F.2d 633, *cert. denied*, 318 U.S. 776 (1943); *Brown* v. *United States*, 69 App. D.C. 96, 99 F.2d 131 (1938); *Kidwell* v. *United States*, 38 App. D.C. 566 (1912).

II. The sweater appellant wore on the night of the crime and expert testimony concerning lipstick stains found on it were properly received in evidence.

(See Tr. 22-25, 28, 138-140, 145-146, 156-157, 187-188, 191).

It is a proper police procedure to require a validly arrested suspect in a criminal case to remove his clothing for the purpose of submitting it to laboratory analysis. This Court said in *Robinson* v. *United States*, 109 U.S. App. D.C. 22, 283 F.2d 508, *cert. denied*, 364 U.S. 919 (1960), where the appellants complained of such a procedure:

> * * * We think that this procedure was proper, since probable cause to believe appellants guilty of house-

[2] Appellant may or may not have made motions for judgment of acquittal. The record on appeal does not make it clear (see Tr. (2) 103); but the ellipses in the transcript indicate that while the testimony was all transcribed, less than the whole trial proceedings is transcribed (see Tr. 199, 201). If a motion for acquittal is not made, an appellant may not question the sufficiency of the evidence on appeal. *Battle* v. *United States*, 92 U.S. App. D.C. 220, 206 F.2d 440 (1953).

> breaking and larceny had already appeared, and appellants were validly under arrest therefor. See, E. g., Weeks v. United States, 1914, 232 U.S. 383, 392, 34 S.Ct. 341, 58 L.Ed. 652; Morton v. United States, 79 U.S. App. D.C. 329, 147 F.2d 28, certiorari denied 1945, 324 U.S. 875, 65 S.Ct. 1015, 89 L.Ed. 1428; Shettel v. United States, 1940, 72 App. D.C. 250, 113 F.2d 34.

When the police officers told appellant to remove his sweater there was probable cause to believe he was Mrs. Morris' assailant; and he was validly under arrest for the offenses. It was proper then to require him to remove his sweater, and to submit the article to the FBI laboratory for analysis. *Robinson* v. *United States*, *supra*. *Cf. Smith* v. *United States*, 88 U.S. App. D.C. 80, 86, 187 F.2d 192, 198 (1950) *cert. denied*, 341 U.S. 927 (1951); *McFarland* v. *United States*, 80 U.S. App. D.C. 196, 150 F.2d 593, *cert. denied*, 326 U.S. 788 (1945); *Holt* v. *United States*, 218 U.S. 245 (1910).

III. The Judge's summary of the evidence was not improper.

(See Tr. 5-6, 97-98, 101, 201-221, Tr.(2) 128.)

A trial judge may summarize the evidence in a criminal trial. *Roberts* v. *United States*, supra; *Heinecke* v. *United States*, 111 U.S. App. D.C. 98, 294 F.2d 727 (1961). And it is not necessary that every detail of testimony be brought out when evidence is summarized. See *Stoneking* v. *United States*, 232 F.2d 385 (8th Cir.), *cert. denied*, 352 U.S. 835 (1956). Judge Holtzoff's summary of the evidence was a fair synopsis, and not one-sided (Tr. 209-217). See *Starr* v. *United States*, 153 U.S. 614, 626 (1894). Furthermore, the judge made it clear to the jury that they were the triers of fact. He told them:

> * * * [Y]ou, ladies and gentlemen of the jury, are the sole judges of the facts and you must determine

> the facts yourselves on the basis of the evidence and solely on the basis of the evidence introduced at this trial. (Tr. 203.)

The judge further instructed the jury:

> * * * The Court's summary, discussion and comments on the facts and on the evidence are not binding on you, they are intended only to help you, and you need attach to them only such weight as you deem wise and proper. If your recollection or your understanding or your view of the evidence in any respect whatsoever differs from mine, then it is your recollection, your understanding and your view of the evidence that must prevail because, I repeat, the final decision on the facts is solely within your province. My instructions are binding on you only as concerns the law. (Tr. 204.)

The judge instructed the jury that they were the sole judges of the credibility of witnesses, and that if they found that a witness wilfully testified falsely about any material fact they could disregard the entire testimony of that witness, or any part of that witness' testimony (Tr. 206-207). The jury is presumed to follow the trial court's instructions. *Delli Paoli* v. *United States*, 352 U.S. 232, 242 (1957); *Hall* v. *United States*, 84 U.S. App. D.C. 209, 171 F.2d 347 (1948). And the instructions must be considered as a whole. *Kinard* v. *United States*, 69 App. D.C. 322, 323, 101 F.2d 246, 247 (1938); *Askins* v. *United States*, 97 U.S. App. D.C. 407, 412, 231 F.2d 741, 746, *cert. denied* 351 U.S. 989 (1956). Thus, if the judge's summary of the evidence had, in fact, left out significant matters favorable to appellant, the instructions made it clear to the jury that their judgment and memory as to the evidence controlled, and negated any alleged ill effect of the summary. *Kinard* v. *United States, supra.* Furthermore, at the conclusion of the summary of the evidence the judge told the jury:

> * * * I may have omitted something that you consider important or indeed you may consider some

> matters significant that I have omitted. I repeat again that you must make your own decision on the facts and on the evidence from your own recollection, and it is your recollection and your understanding that must prevail. The decision on the facts is your function and your duty and your responsibility. (Tr. 217.)

A review of the record, and a comparison to the judge's summary of the evidence shows that the judge did not neglect to mention evidence favorable to appellant. The judge did not specifically mention that Dr. Diggs testified that Mrs. Morris' pulse and blood pressure were normal after the attack; but the judge told the jury that Dr. Diggs testified that when he saw Mrs. Morris she was in "psychogenic shock." The doctor had testified that the term "psychogenic shock" means a condition where the person is actually in shock, but the blood pressure and pulse rate is within normal limits (Tr. 97-98). Thus, the judge's summary of the doctor's testimony, which could not conceivably be considered as favorable to appellant, by using the term "psychogenic shock", actually incorporated the fact that the blood pressure and pulse rate were normal.

The discrepancy between the testimony of Mrs. Morris and her taxi passenger, Mr. Jackson, as to which seat appellant sat in when he was in the cab, was not significant with regard to any of the issues in the case. It was a matter touching on the credibility of witnesses, which trial counsel properly made a subject of his closing argument. Trial counsel told the jury that he did not think Mr. Jackson lied, but that his memory was poor (See Tr. (2) 128). The judge's instructions on credibility of witnesses adequately covered the subject. *Cf. Delli Paoli* v. *United States, supra.*

CONCLUSION

WHEREFORE, it is respectfully requested that the judgment of the District Court be affirmed.

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
JOEL D. BLACKWELL,
MAX FRESCOLN,
Assistant United States Attorneys.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 723917 780